

DEPARTMENT OF DEFENSE

STATEMENT OF REGULATORY PRIORITIES

BACKGROUND

The Department of Defense (DoD) is the largest Federal department, employing over 1.3 million military personnel and 742,000 civilians with operations all over the world. DoD's enduring mission is to provide combat-credible military forces needed to deter war and protect the security of our nation. In support of this mission, DoD adheres to a strategy where a more lethal force, strong alliances and partnerships, American technological innovation, and a culture of performance will generate a decisive and sustained United States military advantage. Because of this expansive and diversified mission and reach, DoD regulations can address a broad range of matters and have an impact on varied members of the public, as well as a multitude of other federal agencies.

The regulatory and deregulatory actions identified in this Regulatory Plan embody the core of DoD's regulatory priorities for Fiscal Year (FY) 2020 and help support or impact the Secretary's three lines of efforts to: 1) build a more lethal force; 2) strengthen alliances and attract new partners; and 3) reform the Department for greater performance and affordability. These actions originate within 5 of DoD's main regulatory components -- the Office of the Under Secretary of Defense for Acquisition and Sustainment (OUSD(A&S)), which is responsible for contracting and procurement policy, the Office of the Under Secretary of Defense for Personnel and Readiness (OUSD(P&R)), which supports troop readiness and health affairs, the DoD Chief Information Officer (CIO), which is responsible for all matters relating the DoD information enterprise, the Department of the Army, which provides prompt and sustained land dominance in our nation's wars, and the United States Army Corps of Engineers (USACE), which provides engineering services to support the national interest. The missions of these offices are discussed more fully below.

DoD's REGULATORY PHILOSOPHY AND PRINCIPLES

The Department's regulatory program strives to be responsive, efficient, and transparent. DoD adheres to the general principles set forth in Executive Order (EO) 12866, "Regulatory Planning and Review,"

dated October 4, 1993, by promulgating only those regulations that are required by law, necessary to interpret the law, or are made necessary by compelling public need. By following this regulatory philosophy, the Department's regulatory program also complements and advances the Secretary's third line of effort -- to reform the Department for greater performance and affordability

The Department is also fully committed to implementing and sustaining regulatory reform in accordance with Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs," dated January 30, 2017, and Executive Order 13777, "Enforcing the Regulatory Reform Agenda," dated February 24, 2017. These reform efforts support DoD's goals to eliminate outdated, unnecessary, or ineffective regulations; account for the currency and legitimacy of each of the Department's regulations; and ultimately reduce regulatory burden and costs placed on the American people.

In support of DoD's reform efforts, DoD appointed a Regulatory Reform Officer to oversee the implementation of regulatory reform initiatives and policies. DoD also established a Regulatory Reform Task Force (Task Force) to review and evaluate existing regulations and make recommendations to the Agency head regarding their repeal, replacement, or modification, consistent with applicable law.

DoD is implementing its reform efforts in three general phases:

- Phase I: Utilizing the Task Force. The Task Force assessed all 716 existing, codified DoD regulations to include 350 solicitation provisions and contract clauses contained in the Defense Federal Acquisition Regulation Supplement (DFARS).
- Phase II: Implementing the approved recommendations. Implementation requires drafting, internal coordination, review by the Office of Management and Budget to include interagency coordination, and providing for notice and comment, as required by law.
- Phase III: Updating policies. Incorporating into its policies a requirement for components to sustain review of both new regulatory actions and existing regulations.

In FY 2020, based primarily on the ongoing work of the Task Force, DoD expects to publish more deregulatory actions than regulatory actions. Exact figures are not yet available as the regulations reported in this edition of the Unified Agenda are still under evaluation for classification under Executive

Order 13771. Additionally, the Task Force will continue working to execute directives under Executive Orders 13783 and 13807 to streamline its regulatory process and permitting reviews.

In addition to reform efforts, DoD is also mindful of the importance of international regulatory cooperation, consistent with domestic law and trade policy, as described in Executive Order 13609, "Promoting International Regulatory Cooperation" (May 1, 2012). For example, DoD, along with the Departments of State and Commerce, engages with other countries in the Wassenaar Arrangement, Nuclear Suppliers Group, Australia Group, and Missile Technology Control Regime through which the international community develops common lists of items to be subject to export controls. DoD has been a key participant in the Export Control Reform (ECR) effort that resulted in a complete overhaul of the U.S. Munitions List and fundamental changes to the Commerce Control List. New controls have facilitated transfers of goods and technologies to allies and partners while helping prevent transfers to countries of national security and proliferation concern. In this context, following ECR, DOD is a key contributor to the ongoing implementation efforts in support of the Foreign Investment Risk Review and Modernization Act (FIRRMA) and Export Control Reform Act (ECRA), signed into law under the FY2019 National Defense Authorization Act (NDAA) in August 2018. Under FIRRMA, DOD has significantly expanded the breadth of its reviews of foreign acquisitions of U.S. assets. Under ECRA, DoD will continue to assess new and emerging technologies to ensure items that provide critical military and intelligence capabilities are properly controlled on international export control regime lists.

DoD PRIORITY REGULATORY ACTIONS

As stated above, OUSD (A&S), OUSD (P&R), the DoD CIO, and the Department of the Army (including USACE) will be planning actions that are considered the most important significant DoD regulatory actions for FY 2020. Further information on these actions is provided below.

OUSD (A&S)/Defense Pricing and Contracting (DPC)

DPC is responsible for all contracting and procurement policy matters in the Department and uses the Defense Acquisition Regulations System (DARS) to develop and maintain acquisition rules and to facilitate the acquisition workforce as they acquire goods and services. For this component, DoD is highlighting the following rules:

Covered Telecommunications Equipment or Services (DFARS Case 2018-D022). RIN: 0750-AJ84

This rule implements section 1656 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018. Section 1656 provides that DoD may not procure or obtain or extend or renew a contract to provide or obtain any equipment, system, or service to carry out the DoD nuclear deterrence mission or the DoD homeland defense mission that uses covered telecommunications equipment or services as a substantial or essential component of any system or as a critical technology as a part of any system. Covered telecommunications equipment or services means telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation, or any subsidiary or affiliate of such entities; telecommunication services provided by such entities or using such equipment; or telecommunications equipment or services produced or provided by an entity that the Secretary of Defense reasonably believes to be an entity owned or controlled by, or otherwise connected to, the governments of China or Russia. A similar Governmentwide ban required by section 889 of the FY 2019 NDAA has been implemented in the Federal Acquisition Regulation (FAR). This rule builds upon the existing framework in the FAR to implement the DoD-specific prohibitions.

Rulemakings of particular Interest to Small Business.

Prompt Payments to Small Business Subcontractors (DFARS Case 2018-D068). RIN: 0750-AK25

This rule implements section 852 of the National Defense Authorization Act for Fiscal Year 2019, which requires accelerated payment dates for small business prime contractors and prime contractors that subcontract with small business concerns. The rule requires accelerated payment dates with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract. In addition, prime contractors that have subcontracts with small businesses must agree to make payments to their small business subcontractors in accordance with the accelerated payment date, to the maximum extent practicable, without any further consideration from, or fees charged to, the subcontractor.

Nonmanufacturer Rule for 8(a) Participants (DFARS Case 2019-D004). RIN 0750-AK39

This rule implements a Small Business Administration's (SBA's) final rule (see 81 FR 34243) for section 1651 of the National Defense Authorization Act for Fiscal Year 2013. Section 1651 revised the nonmanufacturer rule that applies to small business resellers, including participants in the Small Business

Administration's 8(a) Business Development Program. Currently, the DFARS requires 8(a) Program participants to offer end items manufactured or produced by small business concerns in the United States or its outlying areas. when offering items they did not manufacture or produce themselves. The DFARS provides an exemption from this rule for contracts valued at or below \$25,000 awarded under simplified acquisition procedures. in which case an 8(a)Program participant could offer end items manufactured or produced by any domestic firm. SBA's final rule .removed this exemption; therefore, DoD is removing the exemption from the DFARS. As a result, 8(a) Program participants will be required to offer end items manufactured, processed, or produced by small business concerns in the United States or its outlying areas, regardless of the contract value

Rulemakings that streamline regulations and reduce unjustified burdens.

Contractor Purchasing System Review Threshold (DFARS Case 2017-D038). RIN: 0750-AJ48

This rule establishes a higher dollar threshold for conducting contractor purchasing system reviews. Increasing the contractor purchasing system review from \$25 to \$50 million reduces the administrative burden on DoD contractors and the Government for maintaining and reviewing an approved contractor purchasing system. Elevating the threshold will appropriately account for inflation, reduce burden on small contractors, and allow a more efficient and effective use of Government resources to review larger contractors where more taxpayer dollars may be at risk.

Performance-Based Payments (DFARS Case 2019-D002). RIN 0750-AK37

This rule implements section 831 of the National Defense Authorization Act for Fiscal Year 2017, to promote the use of performance-based payments. The rule removes restrictions limiting performance-based payments to amounts not greater than costs incurred up to the time of payment. Performance-based payments are tied to the achievement of specific, measurable events or accomplishments that are defined and valued in advance by the parties to the contract. It is a preferred method of contracting, when the contracting officer finds them practical, and the contractor agrees to their use, as it may incentivize improved contractor performance. This rule is expected to benefit contractors who receive contract financing from DoD in the form of performance-based payments by helping cash flow and incentivizing the management team to focus on technical and schedule progress. The rule requires contractors to be in

compliance with Generally Accepted Accounting Principles in order to receive performance-based payments, with no requirement for Government-unique accounting systems or practices as a prerequisite to receive performance-based payments.

OUSD (Personnel & Readiness)

The Office of the Under Secretary for Personnel and Readiness mission is to develop and implement policies, procedures, and standards for manpower requirements determination and training for the total force; review and evaluate plans and programs to ensure adherence to approved policies and standards; participate in planning, programming, and budgeting activities related to USD(P&R) functions; promote coordination, cooperation, and mutual understanding within the Department, and between the Department and other Federal Agencies, State, and local Governments and the civilian community; and, serve on boards, committees, and other groups pertaining to assigned functional areas and represent the Secretary of Defense on manpower and personnel matters outside the Department.

For this component, DoD is highlighting the following rules:

Family Advocacy Program. RIN: 0790-AI27

The Family Advocacy Program (FAP) is the congressionally-mandated Department of Defense policy proponent and program which, through a coordinated community response model, addresses prevention of and response to child abuse and neglect, domestic abuse, and problematic sexual behavior in children and youth involving military families. Through the Military Services, FAP serves as the entity that offers and provides public awareness and training to Service members and their families, implements prevention initiatives specific to child abuse and domestic abuse, coordinates with child welfare services (in cases of child abuse), ensures child and adult victim safety, provides victim advocacy and support, and manages the Incident Determination Committee process for determining if an incident of child abuse or domestic abuse meets the clinical threshold for intervention services and entry into the Department's FAP Central Registry for tracking trends. Congress recently expanded FAP's scope to include the responsibility to address problematic sexual behavior in children and youth involving military families.

DoD is committed to preventing child abuse and neglect, domestic abuse, and problematic sexual behavior in children and youth by ensuring the FAP provides a full range of prevention and intervention

services to all eligible beneficiaries. This rule will provide guidance to military families if child abuse and neglect, domestic abuse, or problematic sexual behavior occurs. This rule updates a previous rule to incorporate new statutory responsibilities (legislated in the FY19 NDAA) for the FAP to expand its scope to address problematic sexual behavior in children and youth and deliver services to impacted families. The Department has a responsibility to care for the well-being of military Service members and their families by preventing and intervening in incidents of interpersonal abuse.

Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, Amendment (RIN: 0790-AK79)

DoD is proposing to amend the regulation implementing the Military Lending Act, also referred to as the “MLA,” to ensure continued access to reasonable credit by Service members and families to finance a motor vehicle purchase and reduce the burden and risk to business of potentially extending unsecured credit for such transactions. The MLA, as implemented by the regulation, provides two broad classes of requirements applicable to a creditor. First, the creditor may not impose a Military Annual Percentage Rate (“MAPR”) greater than 36 percent in connection with an extension of consumer credit to a covered borrower (“interest-rate limit”); second, when extending consumer credit, the creditor must satisfy certain other terms and conditions, such as providing certain information (e.g., a statement of the MAPR), both orally and in a form the borrower can keep, before or at the time the borrower becomes obligated on the transaction or establishes the account, refraining from requiring the covered borrower to submit to arbitration in the case of a dispute involving the consumer credit, and refraining from charging a penalty fee if the borrower prepays all or part of the consumer credit (collectively, “other MLA conditions”). Other prohibited terms and conditions, include the use of the title of vehicle as security for that obligation unless the creditor is chartered or licensed under Federal or State law as a bank, savings association, or credit union. The regulatory construct of this language, prohibits a creditor from using the title of a vehicle as security for the obligation in a bona fide motor vehicle sales transaction unless the initiating creditor, and any subsequent assignees, are a chartered or licensed under Federal or State law as a bank, savings association, or credit union. Such a construct prohibits certain classes of creditors and assignees from or issuing secured credit to facilitate the bona fide credit sale of a vehicle. The proposed change to the regulation is limited to this technical adjustment to allow certain classes of creditors to continue to offer

reasonable credit terms to MLA “covered borrowers” to finance the bona fide purchase of a motor vehicle under certain conditions where a loan with proceeds used for multiple purposes may not qualify for the limited vehicle purchase loan exception in the statute and regulation.

Chief Information Officer

The Department of Defense Chief Information Officer (DoD CIO) is the principal staff assistant and senior advisor to the Secretary of Defense and Deputy Secretary of Defense for information technology (IT) (including national security systems and defense business systems), information resources management (IRM), and efficiencies. This means that DoD CIO is responsible for all matters relating the DoD information enterprise, such as cybersecurity, communications, information systems, and more.

For this component, DoD is highlighting the following rule:

Department of Defense (DoD)-Defense Industrial Base (DIB) Cybersecurity (CS) Activities. RIN: 0790-AK86

This rule will revise the DoD-Defense Industrial Base (DIB) Cybersecurity (CS) activities -- expanding current voluntary cyber threat information sharing activities for all contractors having Defense Federal Acquisition Regulation Supplement (DFARS) Clause 252.204-7012, “Safeguarding Covered Defense Information and Cyber Incident Reporting,” as part of their contracts. This revised regulation aligns with the Administration’s effort to promote public-private cyber collaboration.

Department of the Army

The Army, is one of the three military departments (Army, Navy and Air Force) reporting to the Department of Defense. The Army Mission remains constant: To deploy, fight and win our nation’s wars by providing ready, prompt and sustained land dominance by Army forces across the full spectrum of conflict as part of the joint force.

For this component, DoD is highlighting the following rule:

Revised Eligibility Criteria at Arlington National Cemetery. RIN: 0702-AB08

This regulatory action amends eligibility criteria for in-ground interment and above-ground inurnment at Arlington National Cemetery (ANC) and the U.S. Soldiers’ and Airmen’s Home National Cemetery in order

to meet the intent of the FY19 National Defense Authorization Act to preserve ANC as an active burial ground “well into the future.” This regulatory action is expected to affect the eligibility (only at ANC) of a large portion of the approximately 22 million living Veterans and military service members. Non-significant portions of this regulation also define important terms and add or amend other governing policies for operations in Army cemeteries.

Corps

USACE

The United States Army Corps of Engineers (Corps) is a major Army command made up of some 37,000 civilian and military personnel, making it one of the world's largest public engineering, design, and construction management agencies. Its Civil Works program has three main missions: flood and storm damage reduction, commercial navigation, and aquatic ecosystem restoration in the United States. USACE also has a Military program. Under this program, the Corps is involved in the design and construction management of military facilities for the Army, Air Force, Army Reserve and Air Force Reserve and other Defense and Federal agencies.

For this component, DoD is highlighting the following rules, all of which pertain to the Civil Works program:

Policy for Domestic, Municipal, and Industrial Water Supply Uses of Reservoir Projects Operated by the Department of the Army, U.S. Army Corps of Engineers. RIN: 0710-AA72

The Corps is updating and clarifying the policies governing the use of its reservoir projects for domestic, municipal, and industrial water supply pursuant to the Flood Control Act of 1944 section 6, 33 U.S.C. section 708 (section 6), and the Water Supply Act of 1958, 43 U.S.C. section 390(b)(WSA). Rules for the use of storage space in Corps reservoirs for water supply are intended to update existing water supply policies and practices which are generally set forth in an internal publication, Engineer Regulation (ER) 1105-2-100, Planning Guidance Notebook (Apr. 22, 2000). This guidance has not been updated to reflect recent legal opinions, judicial decisions, and legislation affecting Section 6 and the Water Supply Act, does not fully articulate the Corps' understanding of the differing Congressional intent behind the two statutes, and does not clearly define the Corps facilities to which the statutes apply, or the types of water

uses, that can be accommodated under Section 6 and the Water Supply Act. This revision supports a recommendation of the DoD Regulatory Reform Task Force.

Natural Disaster Procedures: Preparedness, Response, and Recovery Activities of the Corps of Engineers. RIN: 0710-AA78

The Corps is proposing to update the Federal regulation for its natural disaster procedures currently promulgated in 33 CFR part 203. This proposed rule continues the rulemaking process to revise 33 CFR part 203, which implements section 5 of the Flood Control Act of 1941, as amended (33 U.S.C. 701n), commonly referred to as Public Law 84-99. The Corps initiated this process through advanced notice of proposed rulemaking (ANPRM) on February 13, 2015. The revisions under consideration would respond to the comments to the ANPRM. The revisions also would address statutory changes to the program enacted in section 3011 and 3029 of the Water Resources and Reform Development Act of 2014 (WRRDA 2014), and section 1176 of the Water Resources Development Act of 2016 (WRDA). The revisions also would reflect changes in guidance that USACE has issued since 2003, when it last revised 33 CFR part 203. .

Revised Definition of "Waters of the United States." RIN: 0710-AA80

In 2015, the Environmental Protection Agency and the Department of the Army (the agencies) published the "Clean Water Rule: Definition of Waters of the United States" (80 FR 37054, June 29, 2015). On February 28, 2017, the President signed Executive Order 13778, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States Rule'," which instructed the agencies to review the 2015 Rule and rescind or replace it as appropriate and consistent with law. The agencies published the proposed rule on February 14, 2019, as a second step in a comprehensive, two-step process to revise the definition of waters of the United States consistent with Executive Order 13778. In this second step, the agencies are conducting a substantive re-evaluation and revision of the definition of waters of the United States in accordance with the Executive order. The agencies plan to finalize the revised definition after reviewing public comments on the proposal.

Compensatory Mitigation for Losses of Aquatic Resources--Review and Approval of Mitigation Banks and In-Lieu Fee Programs. RIN: 0710-AA83

In 2008, the Corps and the U.S. Environmental Protection Agency (EPA) issued a final rule governing compensatory mitigation for losses of aquatic resources (73 FR 19593). The regulation prescribes a review and approval process for the establishment and management of mitigation banks and in-lieu fee programs. The regulation also includes time frames for certain steps in the mitigation bank and in-lieu fee program review and approval process. The review and approval process for mitigation banks and in-lieu fee programs includes an opportunity for public and agency review and comment, as well as a second review by an interagency review team. The interagency review team consists of Federal, Tribal, State, and local agencies that review documentation and provide the Corps with advice on the establishment and management of mitigation banks and in-lieu fee programs. The Corps is reviewing the review and approval process and the interagency review team process to identify ways to enhance the efficiency of the mitigation bank and in-lieu fee program approval time frames, which could result in savings to the public through shorter review times for proposed mitigation banks, in-lieu fee programs, instrument modifications, and credit release requests while also promoting conservation and wetland mitigation projects. The Corps will also consider whether there are opportunities for efficiency and clarity improvement from relying on other types of credit metrics for stream compensatory mitigation projects rather than linear metrics.

Reissuance and Modification of Nationwide Permits. RIN: 0710-AA84

The Corps issues nationwide permits to authorize specific categories of activities in jurisdictional waters and wetlands that have no more than minimal individual and cumulative adverse environmental effects. Since the submission and review of such nationwide permits can take significantly less time than individual permits, any changes to the program that increase the conditions under which the nationwide permits can be used could result in significant cost savings for the public. The issuance and reissuance of nationwide permits must be done every five years to continue the Nationwide Permit Program. The nationwide permits were last issued on December 21, 2016, and expire on March 18, 2022. On October 25, 2017, the Corps issued a report to meet the requirements of Executive Order 13783, Promoting Energy Independence and Economic Growth. In that report, the Corps recommended changes to nine nationwide permits that authorize activities related to domestic energy production and use, including oil, natural gas, coal, and nuclear energy sources, as well as renewable energy sources such as flowing

water, wind, and solar energy. This rulemaking action would seek to review and, if appropriate, modify those nine nationwide permits in accordance with the opportunities identified in the report in order to reduce burden on the public. In addition, the Corps is considering modifying several other nationwide permits to provide consistency with the proposed modifications of the nine nationwide permits identified under Executive Order 13783. The Corps is also considering reissuing the remaining nationwide permits to keep all 52 nationwide permits on the same five-year cycle.